Supreme Court, U.S.
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No. 94-1262

In The

Supreme Court of the United States

October Term, 1994

RONALD B. PAUL,

Petitioner,

v.

FARMLAND INDUSTRIES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the plaintiff's prior employment experience was at issue and where the plaintiff testified regarding certain documents contained in the personnel file of his previous employer, did the trial court abuse its discretion in admitting into evidence the documents from the personnel file of the plaintiff's previous employer?

LIST OF PARTIES

The parties to the proceeding in the United States District Court for the Western District of Missouri were the petitioner, Ronald B. Paul, and the respondent, Farmland Industries, Inc.

Pursuant to Supreme Court Rule 29.1, Farmland Industries, Inc. states that it has no parent companies and that the following companies are subsidiaries and affiliates that are not wholly owned by Farmland Industries, Inc.:

AG Processing, Inc.; B.C.'s Truck Plaza; Big Country Feeds Ltd. Liability Co.; Broadcast Partners; Cenex/ Farmland, Inc.; Dakota Fuels, Inc.; Farm Kan. L.L.C.; Farmhut Company L.L.C.; Farmland Hydro, Inc.; Farmland Hydro, Limited Partnership; Feeder Pig Producers I, Inc.; Flag, Inc.; Flag, L.P.; FS, Inc.; Harvest States Feed JV; Heartland Wheat Growers, Inc.; Heartland Wheat Growers, L.P.; Horizon Feed, Inc.; Hyplains Beef, L.C.; Landmark Nutritional Services; Liqui-Tech; Market Communications Group, L.L.C.; National Beef Packing Company, L.P.; National Carriers, Inc.; Nedi-Farmland G.P., Inc.; Nedi-Farmland, L.P.; North Platte Petroleum Corporation, Inc.; North Platte Petroleum Partners, L.P.; Nufarm USA, Inc.; Penterra, Inc.; Sandoz; SF Phosphate Limited Company; Southwest Liquids, L.L.C.; Sugar Creek River Terminal L.L.C.; The Cooperative Finance Association, Inc.; Thompson's Pet Pasta Products, Inc.; Tire & Oil Distributors, L.C.; Tri-Energy Limited Liability Corporation; Wilfarm, L.L.C.; Nebraska Energy Limited Liability Company Universal Co-Op, Valores De Inversion en Tecnologia para Empresas Pecuarias, S.A. de C.V. Sociedad de Inversion de Ca

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STATEMENT OF THE CASE

Contrary to the petitioner's suggestion, the primary issue does not involve the doctrine of "after-acquired" evidence as that doctrine has developed through the lower courts and been recently addressed by this Court in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 63 U.S.L.W. 4104 (1995). Rather, the primary issue is whether the trial court abused its discretion in admitting certain documents into evidence during the nine-day jury trial of the petitioner's age discrimination, breach of contract and fraud claims. The Eighth Circuit unanimously found no abuse of discretion, holding that the petitioner had "opened the door" with respect to the documents and that the documents were relevant to disputed issues at trial. Because this case involves a straightforward evidentiary issue, there are no special or important reasons for granting the petition for writ of certiorari.

Ronald B. Paul (then age 50) began employment with Farmland Industries, Inc. on October 12, 1987. Farmland's Chief Executive Officer, James Rainey (then age 57), and Chief Operating Officer, G. C. "Lefty" Matthiesen (then age 59), made the decision to employ Paul as Vice President and Chief Information Officer, one of the highest ranking positions of responsibility within Farmland. On August 3, 1989 (less than two years later), Rainey and Matthiesen discharged Paul (then age 52) for performance reasons. Paul brought suit, alleging that his termination was the result of unlawful age discrimination, in breach of an alleged employment contract, and constituted fraud.

The case was originally set for trial in October 1991. Shortly before the beginning of trial, Farmland conducted a records deposition of Paul's previous employer, Macy's. Paul's personnel file at Macy's contained, among other documents, two negative performance evaluations and a settlement agreement between Paul and Macy's indicating that a dispute had arisen, had been settled, and that Paul agreed not to seek employment or re-employment with Macy's.

After opening statements in the October 1991 trial, Paul's counsel requested and was granted a mistrial. The case was reset for trial in July 1992. Before the venire was brought in for voir dire examination, Paul's counsel objected to the presence of a Farmland hat in the courtroom. Paul's counsel requested and was granted a mistrial. The case was reset for trial in May 1993. During the nine-day jury trial, substantial evidence was received regarding Paul's employment at Macy's, including Paul's own testimony and the Macy's personnel file documents. At the conclusion of all the evidence, the trial court granted judgment as a matter of law in favor of Farmland on Paul's breach of contract and fraud claims. The jury returned a verdict in favor of Farmland on Paul's claim of age discrimination. Paul's motion for retrial on all issues was denied.

On appeal to the Eighth Circuit Court of Appeals, a divided panel affirmed as to the breach of contract claim on the basis that Paul failed to prove the existence of an enforceable employment agreement. *Paul v. Farmland Industries, Inc.*, 37 F.3d 1274, 1276 (8th Cir. 1994). Judge Heaney, dissenting, would have found that a jury issue had been raised as to the existence of an enforceable

employment agreement. *Id.* at 1277-79. Paul does not seek review of the Eighth Circuit's determination on the breach of contract claim.

The Eighth Circuit panel unanimously found that Paul failed to establish a fraud cause of action. *Id.* at 1276-77. Paul does not seek review of the Eighth Circuit's determination on the fraud claim.

The Eighth Circuit panel also unanimously affirmed the jury's verdict in favor of Farmland on the age discrimination claim. *Id.* at 1277. Paul now contends that the admission into evidence of the Macy's personnel file documents requires retrial of the age discrimination claim.

With respect to this evidentiary issue, the Eighth Circuit held that there was no abuse of discretion in admitting the Macy's documents; that Paul had "opened the door" with respect to the documents; and that the Macy's documents were relevant to disputed issues at trial. *Id.* Moreover, the Eighth Circuit held that "[g]iven Paul's weak age discrimination case – Paul was fifty when he was hired; he was terminated at age fifty-two by the same people who hired him, all of whom were older than he was – it is unlikely that the result would have been different if the evidence had been excluded." *Id.* The Eighth Circuit further noted that there was ample evidence that Paul was discharged for poor performance. *Id.* On this writ of certiorari, Paul seeks review only of the Eighth Circuit's determination on this evidentiary issue.

ARGUMENT

A. The Macy's documents were relevant to several disputed factual issues.

Resolution of this evidentiary issue, as with any evidentiary issue, begins with the fundamental concept that all relevant evidence is admissible. Fed. R. Evid. 402. Relevant evidence is evidence that "has *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). In his petition, Paul repeatedly posits that the Macy's documents were inadmissible because they were not known to Farmland at the time of Paul's termination and thus were not relevant to the single issue of the reason for Paul's discharge. Contrary to Paul's myopic view of this case, the Macy's documents were relevant to a number of disputed issues at trial.

First, *on direct examination by his attorney,* Paul testified at length regarding his employment at Macy's. Paul made specific references to two negative performance appraisals and made reference to his consultation with an attorney to negotiate his departure from Macy's. On cross-examination, and *without objection by Paul's counsel,* Paul testified regarding the settlement agreement that he signed when he left Macy's. As a result, Paul clearly opened the door into inquiry into his performance at Macy's and the circumstances surrounding his departure at Macy's, including the settlement agreement. Farmland was free to pursue these lines of inquiry. *See Alpha Display Paging, Inc. v. Motorola Communications and Elects., Inc.,* 867 F.2d 1168, 1171 (8th Cir. 1989); *see also McAlinney v.*

Marion Merrell Dow, Inc., 992 F.2d 839, 844 (8th Cir. 1993) ("An objection is not timely where counsel makes the objection only after the witness has answered several questions on the subject of the objection.").

Second, Paul claimed that he was qualified by virtue of his background to perform the position for which he was hired at Farmland. Further, Paul compared his background with that of the individual who replaced him. Consequently, Paul's background was in issue and his performance at Macy's was relevant to that inquiry. *See Sczesnik v. McDonald's Corp.*, 40 FEP 1794, 1796 (N.D. Ill. 1986) (plaintiff's employment and educational background was relevant to comparison of her qualifications with qualifications of male employees whom she claimed were treated differently than she).

Third, at the time that the Macy's documents were admitted into evidence, Paul's fraud claim was still before the jury. As an element of the fraud claim, Paul was required to prove that he relied on alleged representations by Farmland in accepting employment with Farmland. *See Sofka v. Thall*, 662 S.W.2d 502, 506 (Mo. 1983) (en banc). In that regard, Paul claimed that he had an opportunity to continue his employment at Macy's. The settlement agreement in the Macy's documents, however, expressly stated that Paul resigned and "would not seek employment or re-employment with Macy's." Thus, the settlement agreement was relevant to the issue of Paul's claimed detrimental reliance on alleged representations by Farmland.

Finally, consistent with this Court's recent decision in *McKennon*, the Macy's documents tended to prove that

Paul misrepresented his qualifications at the time of his hiring and thus were relevant to the determination of the amount of backpay to which Paul may have been entitled. 115 S. Ct. at ___, 63 U.S.L.W. at 4107.

For all of these reasons, the Macy's documents were relevant and there was no abuse of discretion in admitting the evidence.

B. Any error in admitting the Macy's documents was not so prejudicial as to require a new trial that would likely produce a different result.

Even if there had been some error in the admission of the Macy's documents, that does not end the inquiry. A jury's verdict will not be disturbed due to an error in admission of evidence unless the error was so prejudicial as to require a new trial that would be likely to produce a different result. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990). At trial, Paul opened the door, through his own testimony, with respect to the Macy's performance evaluations and settlement agreement. Because Paul made the jury fully aware of the existence of the negative evaluations and settlement agreement, any error in also admitting the documents themselves could not have been so prejudicial as to require a new trial. *See McAlinney*, 992 F.2d at 844 (finding no prejudicial error where the "bulk of the damaging testimony came in without objection"). This is especially true in light of the fact that no portion of the Macy's documents was ever displayed to the jury during trial nor submitted to the jury during deliberations.

Further, as the Eighth Circuit found, Paul's age discrimination claim was weak. He was fifty when he was hired, worked for less than two years, and was discharged by the same people who hired him. The Eighth Circuit has affirmed judgment as a matter of law in a case with nearly identical facts. *See Lowe v. J. B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992) (plaintiff was 51 years of age when hired and was discharged less than two years later by the same company officials involved in the hiring decision). *See also Rand v. CF Indus., Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994) (plaintiff age 47 when hired and discharged less than two years later); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993) (plaintiff was age 57 when decisionmaker approved transfer and was discharged less than two years later), *cert. denied*, 114 S. Ct. 1398 (1994); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (plaintiff hired at age 68 and discharged six months later); *EEOC v. MCI Int'l, Inc.*, 829 F. Supp. 1438, 1461 (D. N.J. 1993) (plaintiff hired at age 49 and discharged less than three years later). Accordingly, the admission of the Macy's documents into evidence, after Paul had "opened the door" with his own testimony, could not have been prejudicial error.

C. Paul cannot raise, for the first time in this Court, an alleged error in jury instructions.

On this petition, Paul requests that this Court exercise its discretion to define the limits on admissibility of "after-acquired" evidence and provide guidance on limiting instructions to the jury. This is not the case to engage

in such an exercise. The claimed "after-acquired" evidence in this case was relevant to a number of issues at trial beyond the single issue of the relief available for alleged age discrimination. Moreover, Paul did not request a limiting instruction at trial or allege any instructional error on appeal to the Eighth Circuit Court of Appeals. Accordingly, Paul may not now complain of instructional error in this Court. Fed. R. Civ. P. 51; *Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1069 (8th Cir.), *cert. denied*, 469 U.S. 1077 (1984); *Knight v. Caldwell*, 970 F.2d 1430, 1433 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1298 (1993); *Walker v. Action Industries, Inc.*, 802 F.2d 703, 710-11 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

CONCLUSION

Despite petitioner's attempts to characterize this as the perfect companion case to *McKennon*, this petition for writ of certiorari is nothing more than a request that this Court review a mundane evidentiary issue that has been decided by the District Court and affirmed by a unanimous panel of the Eighth Circuit Court of Appeals. There are no special or important reasons for granting the petition.

Respectfully submitted,

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